85-797

No. 85-

Supreme Court, U.S.
FILED
NOV 8 1985
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS,
Petitioner,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 8, 1985

QUESTION PRESENTED

Whether Section 18(a)(1)(B) of the Federal Trade Commission Act authorizes the FTC to promulgate a rule prohibiting an act or practice as "unfair" within the meaning of Section 5(a)(1), when the commercial activity is permitted by the states under close regulation designed to protect against the very consumer injuries at which the FTC's rule is aimed.[1]

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[1] In its petition for certiorari seeking review of the same judgment of the Court of Appeals, the American Financial Services Association presents this and two other questions raised by the decision below. Petitioner South Carolina Department of Consumer Affairs, while especially alarmed by the FTC's gratuitous exercise of preemptive power in this case, reserves the right to address those two other questions if certiorari is granted, and adopts, by reference as though fully set forth herein, those portions of AFSA's petition that address those questions. The parties below are listed in AFSA's petition at page ii.

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Petitioner South Carolina Department of Consumer Affairs ("SCDCA") seeks review of a decision of the D.C. Circuit upholding a Federal Trade Commission rule broadly preempting state regulation of consumer credit practices.

OPINION BELOW

The opinion of the Court of Appeals, reported at 767 F.2d 957, is set forth as Appendix A to the petition of American Financial Services Association, which has filed a petition seeking review of the same judgment. The FTC's Credit Practices Rule, codified at 16 C.F.R. Part 444, is set forth as Appendix B to AFSA's petition. The FTC's statement of the rule's basis and pur-

pose, published at 49 Fed. Reg. 7740 (1984), is set forth as Appendix C to AFSA's petition. Citations herein to "Pet. App." are to the separately bound appendix to AFSA's petition.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1985. On October 2, 1985, Chief Justice Burger extended the time in which to petition for certiorari from October 10, 1985 to November 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

FEDERAL TRADE COMMISSION ACT—

§ 5(a)(1), 15 U.S.C. § 45(a)(1):

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

§ 18(a)(1)(B), 15 U.S.C. § 57a(a)(1)(B):

> "(1) . . . the Commission may prescribe—
>
> . . .
>
> (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title) . . . . Rules under this paragraph may include requirements prescribed for the purpose of preventing such acts or practices.

STATEMENT OF THE CASE

The South Carolina Department of Consumer Affairs adopts the statement of the case set forth in AFSA's petition, as though fully set forth herein.

REASONS FOR GRANTING THE WRIT

In upholding the Credit Practices Rule, the Court of Appeals rejected—virtually without analysis—SCDCA's claim that the FTC had exceeded its authority under Section 18(a)(1)(B) of the Federal Trade Commission Act by preempting carefully wrought consumer protection statutes of states which, like South Carolina, permit consumers to obtain credit by pledging household goods as collateral but regulate consumer credit transactions so as to protect consumers against the injuries with which the FTC professes to be concerned. Pet. App. 61a-65a. The court's majority did so in spite of its own recognition that Congress did *not* intend to authorize the FTC freely to preempt state consumer-protection laws. Pet. App. 61a-62a n.41. And it did so in the teeth of Judge Tamm's admonition in dissent that principles of federalism dictate deference by the FTC to the states' exercise of their police powers—and that, in measuring the general regulatory burden of rules proposed under Section 18(a)(1)(B), the FTC should consider "the disruptive effect federal regulation would have upon state regulatory schemes." Pet. App. 69a-70a n.2.

In framing the Credit Practices Rule, the FTC was clearly conscious that it was treading on thin ice in supplanting state consumer-protection laws. Although it prohibited consumers from obtaining credit by pledging household goods and other property as collateral, it lamely insisted that it was not preempting any state law—because creditors could "comply" both with the rule *forbidding* the taking of security interests in such property *and* with state laws *allowing* them to do so. See Pet. App. 256a-257a. This is little more than a play on words. The FTC further belied its confidence in the legitimacy of its exercise of preemptive power here by promising to consider any state's request for an exemp-

tion from the Credit Practices Rule if the state can demonstrate that it offers protections equal to or greater than those provided by the rule—provided that it administers and enforces those protections "effectively." 16 C.F.R. § 444.5 (Pet. App. 86a).

Review should be granted to make clear that the FTC may not, pursuant to its Section 18(a)(1)(B) rulemaking authority, thus make supplicants of the states, requiring them to prove to the satisfaction of federal authorities that they have "effectively" exercised their police powers so as to afford their own citizens protection against injuries with which the FTC is concerned.[1] This is not the regime that Congress contemplated in enacting Magnuson-Moss in 1975. As the Court of Appeals recognized, Congress did not intend in expanding the FTC's powers "to occupy the field or in any way to preempt State or local agencies from carrying out consumer protection or other activities within their jurisdiction which are also within the expanded jurisdiction of the Commission." H.R. Rep. No. 1107, 93d Cong., 2d Sess. 45 (1975) (quoted at Pet. App. 61a-62a n.41). The FTC was intended to exercise preemptive authority only where state regulation was demonstrably ineffective. It may not justify preemption by blunderbuss claims that preemption is warranted because state law "does not *always* offer adequate protection." Pet. App 153a (emphasis added). The burden should not be on the states to prove, after the FTC has exercised its preemptive power, that they are affording their own citizens adequate protection.

This is not a situation in which federal intervention is required because the activity in question is beyond

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[1] Among other things, states must satisfy the FTC with respect to "the resources committed by the state" to enforce its laws (Pet. App. 258a), and the FTC reserves the right to revoke any exemption if it concludes that a state is not administering and enforcing its laws as vigorously as federal officials deem appropriate. (*Id.*)

the jurisdiction of the states to regulate; to the contrary, this is a situation in which the states have dealt comprehensively with the activity in question, and the activity is one of intimate local concern. The states have dealt with it by enacting comprehensive consumer-protection laws carefully balancing a complex set of interconnected interests. They widely regulate interest levels in light of other restrictions on the availability and cost of credit, for example; and they establish narrowly tailored restrictions on borrower conduct that avoid abuse without unduly curtailing consumer access to credit.

South Carolina itself permits consumers to pledge household goods to obtain loans but protects consumers against the very abuses identified by the FTC. It has outlawed false threats to repossess (S.C. Code Ann. § 37-5-108(2) & (5)(a)), and it allows a borrower not only to obtain an injunction against a lender who engages in such abusive debt collection practices, but also to obtain treble damages along with court costs and attorney's fees (*id.* § 37-5-108(2) & (6)). Abusive debt collection acts or practices are also subject to a wide range of administrative remedies by the Administrator of the South Carolina Department of Consumer Affairs, including injunctions (*id.* §§ 37-6-110 and 37-6-111), cease-and-desist orders (§ 37-6-108), and civil actions for damages either for an individual or a class (*id.* § 37-6-113(1)), as well as for civil penalties.

At a minimum, the FTC must not *needlessly* trench on state consumer-protection schemes by preempting state regulation more broadly than necessary to prevent the abuses identified on the rulemaking record. If the FTC is concerned about false threats of repossession of household goods, it should preempt state law to the extent that state law permits such false threats—rather than preempting all state laws permitting the use of household goods as collateral. If it is concerned about lenders ex-

erting unfair pressure on borrowers, it should preempt state law to the extent that state law permits lenders to exert such unfair pressure—and no further. What it may not do under Section 18(a)(1)(B) is to forbid, sweepingly and gratuitously, conduct permitted by state law that does not itself injure consumers. No such gross infringement of state police powers was authorized by Congress.

Here, as in the case of another consumer-protection rule promulgated under Section 18(a)(1)(B), the FTC's preemption of state law "is almost as thorough as human ingenuity could make it." *American Optometric Association* v. *FTC*, 626 F.2d 896, 910 (D.C. Cir. 1980). Accordingly, here as there, "the Commission has at least approached the outer boundaries of its authority and may have infringed on that deference to the states' exercise of their police powers dictated by the principles of federalism." *Id.* Whether the FTC has crossed the line here—exceeding its preemptive authority under the Magnuson-Moss Act—is a question that warrants this Court's review.

CONCLUSION

For the foregoing reasons, review should be granted.

Respectfully submitted,

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November 8, 1985

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT AMERICAN CONFERENCE OF UNIFORM CONSUMER CREDIT CODE STATES SUPPORTING PETITIONERS

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November 27, 1985

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Pursuant to Rule 19.6, respondent American Conference of Uniform Consumer Credit Code States, which intervened in the proceeding in the court below to urge that the Credit Practices Rule be set aside, files this brief in support of the petitioners.

1. Respondent is an association of Consumer Credit Administrators in the states that have adopted, in whole or in substantial part, versions of the Uniform Con-

sumer Credit Code. The conference's mission is to establish, through the voluntary action of the states, a uniform nation-wide system of consumer credit regulation ensuring "an adequate volume of credit at reasonable cost under conditions fair to both consumers and creditors." [1] Those states that have thus far adopted versions of the Code in whole or in substantial part include Colorado, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Wisconsin, and Wyoming.

2. The American Conference of Uniform Consumer Credit Code States opposed the Credit Practices Rule from the beginning and intervened in the court below to urge that the rule be set aside. We support the position urged by the American Financial Services Association and the South Carolina Department of Consumer Affairs in their petitions in this Court. In our view, the Credit Practices Rule constitutes an unlawful usurpation by the Federal Trade Commission of state regulation of the consumer credit market—a crude, piecemeal effort to address problems comprehensively treated by the consumer protection laws of the various states. We believe that Congress, in enacting the Magnuson-Moss Act, did not intend to authorize the FTC to second-guess the considered judgments of elected state officials as to the most effective means of regulating consumer credit transactions so as to protect consumers from abuse while safeguarding their access to credit.

3. We do not contend that the FTC may not act pursuant to its authority under Section 18(a)(1)(B) to prevent creditor abuse where the states have failed to do so. In this case, however, the FTC has identified creditor abuses that the states have already addressed by means of more narrowly tailored remedies—remedies carefully fashioned to balance the need for consumer

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[1] Uniform Consumer Credit Code (Draft 1974), 7 U.L.A., preparatory note at 583.

protection against the benefits of maximizing the availability of credit while minimizing its cost. By imposing needlessly broad remedies for the abuses it found, the FTC has disrupted the regulatory schemes fashioned by the individual states in a way never contemplated by Congress. And the damage does not stop there. The Credit Practices Rule also threatens to wreck efforts at the state level, by the people's elected representatives, to coordinate their individual consumer protection regimes so as to achieve national uniformity on a voluntary basis and in a politically accountable manner. Congress did not intend the Federal Trade Commission to act as a national Consumer Protection Agency, and the Credit Practices Rule therefore is not merely unwise but beyond the agency's statutory authority.

CONCLUSION

For the foregoing reasons, the petitions should be granted.

Respectfully submitted,

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Trade Commission's Trade Regulation Rule on Credit Practices prohibits lenders and retail installment sellers from employing certain contractual remedies, the uses of which were found by the Commission to be "unfair practices." Among other things, the Rule prohibits creditors from taking non-purchase money security interests in household goods. The questions presented by the petitions for certiorari are:

1. Whether the court of appeals acted properly in denying petitions for review of the Credit Practices Rule where it found substantial evidence supporting the Commission's finding that the practices prohibited by the Rule caused injury to consumers that they could not reasonably avoid, and that was not outweighed by any countervailing benefit to consumers or competition.

2. Whether, where the Commission finds that inclusion of a particular boilerplate clause in consumer credit contracts is unfair, it properly may define the inclusion of such a clause in consumer credit contracts to be an unfair practice.

3. Whether the Commission may lawfully define as an "unfair act or practice" conduct that some states do not already prohibit.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-81a[1]) is reported at 767 F.2d 957. The Federal Trade Commission's Statement of Basis and Purpose accompanying its Trade

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[1]"Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-796.

Regulation Rule on Credit Practices (Pet. App. 87a-282a) is published at 49 Fed. Reg. 7740.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1985. The time within which to file a petition for a writ of certiorari subsequently was extended to and including November 9, 1985. The petitions for a writ of certiorari were filed on November 8, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 1, 1984, the Federal Trade Commission (FTC or Commission) published a Trade Regulation Rule on Credit Practices (Credit Practices Rule or Rule), pursuant to Section 18 of the Federal Trade Commission (FTC) Act, 15 U.S.C. (& Supp. II) 57a.[2] 49 Fed. Reg. 7740 (1984). The Credit Practices rulemaking that culminated in the promulgation of this Rule began in 1975 with the publication of an Initial Notice of Rulemaking setting forth a proposed Credit Practices Rule. The rulemaking was inspired by an extensive study of the consumer credit market conducted by the congressionally-mandated National Commission on Consumer Finance (NCCF), which recommended curtailment of a variety of boilerplate remedial provisions commonly found in consumer credit contracts. The FTC's Bureau of Consumer Protection also conducted its own investigation of the consumer finance industry between 1972 and 1974, to determine whether the uses of certain collection remedies were unfair acts or

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[2]Section 18(a)(1)(B) of the FTC Act (15 U.S.C. 57a(a)(1)(B)) authorizes the Commission to prescribe rules that (1) "define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section [5](a)(1) * * *)" of the Act, 15 U.S.C. 57a(a)(1); and (2) contain "requirements * * * for the purpose of preventing such acts or practices."

practices under Section 5 of the FTC Act, 15 U.S.C. (& Supp. II) 45. Pet. App. 3a-4a, 88a.

Following evidentiary hearings, publication of detailed reports by the presiding officer and FTC rulemaking staff, several public comment periods, further analysis of the record by staff members, and oral presentations by interested parties before the Commissioners themselves, the Commission met in 1983 to determine whether the creditor practices addressed in the rulemaking proceeding were "unfair acts or practices" (Pet. App. 4a-6a). The Commission's definition of such acts provides that an act or practice is "unfair" within the meaning of Section 5 if (1) the practice causes or is likely to cause substantial consumer injury; (2) the injury could not have been reasonably avoided by consumers; and (3) the injury is not offset by any benefits to consumers or competition (Pet. App. 283a-295a).[3] Applying this standard to the record before it, the Commissioners unanimously concluded that several creditor practices met its test, including the taking of nonpurchase money security interests in household goods (HHG)[4] and the taking of

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[3]This test was enunciated by the FTC in 1980 (Pet. App. 283a). It is codified in bills passed by both Houses of Congress. S. 1078, 99th Cong., 1st Sess. (1985); 131 Cong. Rec. S10169 (daily ed. July 26, 1985); H.R. 2385, 99th Cong., 1st Sess. (1985); 131 Cong. Rec. H7503 (daily ed. Sept. 17, 1985). The Senate and House bills presently are awaiting conference to resolve differences unrelated to their definitions of unfair acts or practices. See *House Passes With No Fanfare, FTC's Authorization Bill With Legislative Veto*, 49 Antitrust & Trade Reg. Rep. (BNA) No. 1232, at 483, 485 (Sept. 19, 1985).

[4]A security interest in household goods entitles a creditor to take possession of and sell items subject to the interest if the debtor defaults or the creditor feels insecure. The creditor is not required to obtain a judgment or other court order. Use of contract forms containing blanket HHG security interests was widespread prior to implementation of the Rule, particularly among finance companies (Pet. App. 174a). Such contracts sometimes contained boilerplate provisions reserving a security interest in all "HHG" or "household goods," while others enumerated the collateral subject to the security interest by

future wage assignments.[5]

Applying its test for unfairness to HHG security interests, the Commission found first that the taking of such interests causes substantial consumer injury. Because the resale value of second-hand household goods such as clothing, furniture, bedding, and eating utensils is very small (Pet. App. 178a n.32), a creditor wielding an HHG security interest may seize and resell large quantities of a debtor's possessions in an attempt to satisfy even a small debt. The Commission found that when actual seizures occur,[6] the loss to the debtor, in terms of both the replacement and the sentimental value of the goods, is grossly disproportionate to the monetary recovery (if any) realized by the creditor (*id.* at 180a). The Commission also found that threats or

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broad general categories (such as "all household goods, furniture, appliances, bric a brac and personal property of every kind and description") (*e.g., id.* at 175a n.19). The Rule defines "household goods" to mean (16 C.F.R. 444.1(i)) "[c]lothing, furniture, appliances, one radio and one television, linens, china, crockery, kitchenware, and personal effects" of the consumer or his dependents, but "[w]orks of art; [e]lectronic entertainment equipment (except one television and one radio); [i]tems acquired as antiques; and jewelry (except wedding rings)" are excluded. A purchase money security interest, excluded from the Rule's coverage, is a security interest in an item purchased with the proceeds of a loan (Pet. App. 172a n.3).

[5]The Rule as adopted prohibits several other credit practices that are not at issue here. See 16 C.F.R. 444.2(a)(1) and (3), 443.3(a), 444.4. But the Commission rejected several aspects of the proposed rule, concluding that the practices at issue, while harmful to consumers, provided substantial countervailing benefits to the competitive process (Pet. App. 6a & n.4, 260a-282a). Further, the Rule does not prevent a creditor who obtains a judgment against a defaulting debtor from executing upon the household goods and other possessions of the debtor to the extent permitted by State law. See generally Pet. App. 199a-200a.

[6]Actual seizures of household goods are statistically infrequent, but the rulemaking record details numerous instances in which they have occurred and occasioned serious economic consequences to the individuals involved (Pet. App. 178a-180a).

"suggestions" that household goods will be seized are "commonplace" and are used "in a way which is uniquely threatening and disruptive to consumers and their families" (*id.* at 182a (footnote omitted)).[7]

Moving to the second step of its fairness inquiry, the Commission found that consumers cannot reasonably avoid the injury caused by HHG security interests because "there is no bargaining over the boilerplate contract terms that define creditor remedies" (Pet. App. 109a (footnote omitted)) and because default is ordinarily the product of forces beyond a consumer's control (*id.* at 119a).[8] The Commission found that because default is not ordinarily foreseeable or intended, consumers do not seek out favorable remedial terms in the same fashion as they might shop for or bargain over other terms of the loan, such as its interest rate or repayment provisions (*id.* at 113a). The Commission also found that even if consumers attempted to bargain over or shop for remedial provisions, they would be unable to do so. Many borrowers cannot understand the

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[7]The Commission cited (among other evidence) a study by the National Consumer Law Center, based upon nearly 24,000 consumer cases, which reported that the HHG clause was the most common basis for creditor harassment of consumers of all remedies surveyed (Pet. App. 181a) and that "3 out of every 4 cases involving a delinquent account secured by a non-purchase money collateral lead [*sic*] to harassment; and in 2 of every 4 situations injury results, most predict-ab[ly], anxiety, disruption of household finances and other delinquencies plus (probably) a costly refinancing." J.A. 2105. The Commission's finding on the harmful effects of HHG security interests also was consistent with the conclusions of the NCCF. Pet. App. 184a.

[8]Studies in the record demonstrate that default is typically caused by unforeseeable and unavoidable events that reduce the debtor's income (usually loss of job) or place new demands upon it (most often illness or marital separation) (Pet. App. 118a-119a). The Commission found that the vast majority of debtors do not expect to default when they contract for credit and, in fact, do not default unless beset by some drastic change in financial circumstances (*id.* at 121a).

technical language used to describe remedial provisions (*id.* at 113a-114a & n.16), and inquiries by a prospective borrower regarding remedies might make a creditor wary and hesitant to grant the loan (*id.* at 114a). And uncommonly severe "free rider" and "adverse selection" problems deprived creditors of normal incentives to advertise or otherwise compete on the basis of remedial boilerplate.[9]

Completing its unfairness analysis, the Commission found that the severe, unavoidable harm caused by HHG security interests is not outweighed by any advantage they confer on consumers or competition. Because most household goods have little or no resale value, actual seizure and sale of such goods is not an economically efficient way for a creditor to collect a debt.[10] And because defaults ordinarily occur for reasons beyond the borrower's control, the Commission concluded that even punitive or in terrorem use of HHG security interests would not have any significant incremental effect on most consumers' propensity to make affordable repayments or to refrain from defaulting. Pet. App. 192a.[11]

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[9]The "free rider" problem occurs because a creditor wishing to advertise favorable remedial terms must first expend substantial advertising dollars to educate consumers about the meaning and significance of these terms. Such expenditures, however, would redound equally to the benefit of the advertiser's competitors, creating a strong disincentive to advertise. Pet. App. 119a. "Adverse selection" acts as a barrier to competition because any creditor who seeks to attract honest but risk averse borrowers by offering or advertising the availability of a contract devoid of punitive remedies also risks attracting a disproportionate share of the tiny fraction of borrowers who may not intend to repay their debt (*ibid.*).

[10]The credit industry identified several items of household collateral that experience had shown possess significant resale value. In response, the Commission modified the Rule's definition of "household goods" to exclude such items. Pet. App. 197a.

[11]In reaching this conclusion, the Commission took account of the fact that the proposed Rule left untouched the most commonly used creditor remedies and those considered most valuable by creditors

The Commission also relied for its conclusion upon empirical evidence, including a comparison of data from three states that had restricted HHG security interests with data from states that had not. This comparison indicated that, in fact, creditors "do not significantly restrict credit availability in response to curtailment in the availability of blanket HHG security interest[s]" (Pet. App. 191a n.86).[12] Thus, the Commission found that HHG security interests did not provide benefits to competition (in the form of reducing creditor costs and enabling creditors to extend credit) that would offset the severe, unavoidable consumer injury they caused. *Id.* at 187a-192a, 194a.

The Commission undertook a similar analysis with respect to creditors' use of clauses effecting assignments of future wages. Such clauses, which already are prohibited or severely regulated in most states, entitle the creditor to levy on the debtor's salary at any time without a judgment or other court order. Finding that such wage assignments caused substantial consumer injury, not reasonably avoidable by consumers, and not outweighed by benefit to

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themselves, including (1) acceleration of the debt and direct contacts with the debtor; (2) lawsuit and execution of the judgment; (3) garnishment of the debtor's wages; and (4) security interests in and seizure of goods actually purchased with the proceeds of a particular loan and goods other than household goods. Pet. App. 105a-106a.

[12]In particular, the data indicated no differences between HHG-restrictive and nonrestrictive states with respect to loan amounts and delinquency rates, and slightly *higher* consumer debt/income ratios in restrictive states (Pet. App. 191a n.86). The Commission also considered testimony from officials in states that had restricted use of HHG security interests demonstrating that creditors' forecasts of credit contraction had proven unfounded (*e.g., id.* at 192a) and a statistical analysis of loan data showing no significant differences between income levels of HHG-secured and unsecured borrowers and no significant difference in levels of indebtedness (*id.* at 191a).

competition or creditors, the Commission declared their use to be an unfair practice. See Pet. App. 147a-171a.[13]

2. Petitioners' challenge to the Credit Practices Rule was rejected by the court of appeals.[14] After tracing the evolution of the Commission's authority to proscribe unfair practices (Pet. App. 11a-25a), the court noted that "Congress has not at any time withdrawn the broad discretionary authority originally granted the Commission in 1914 to define unfair practices on a flexible, incremental basis" (*id.* at 15a (footnote omitted)). Indeed, the court found that the three-part test set out by the Commission in 1980 "is the most precise definition of unfairness articulated by either the Commission or Congress" (*id.* at 25a (footnote omitted)). The court thus rejected petitioners' contention that the Commission may regulate only conduct involving deception or coercion, finding such a restriction supported neither by Commission precedent (*id.* at 42a-44a) nor by congressional mandate (*id.* at 46a).

Turning to the record here, the court found that the Commission's action was supported by substantial evidence (Pet. App. 26a-37a, 52a-61a). It also determined that the Commission had not violated the doctrine of *Katharine Gibbs School, Inc.* v. *FTC*, 612 F.2d 658 (2d Cir. 1979).

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[13]The Commission's prohibition on wage assignments was consistent with the advice of its Presiding Officer, who concluded that the "absolute prohibition on wage assignments would be of economic benefit to low-income or poor consumers" and "would not have a significant economic impact on creditors generally." J.A. 640. In attributing to the Presiding Officer the view that " 'low-income consumers would be deprived of access to credit' " if wage assignments were restricted (85-796 Pet. 10), petitioner quotes the Presiding Officer's summary of the testimony of a single credit industry witness, rather than the conclusions that the Presiding Officer reached based upon his review of all the evidence.

[14]The attorneys general of 16 states filed an amicus brief before the court of appeals supporting the Commission.

That decision had set aside a Commission rule "designed to prevent unrelated, unspecified unfair" practices; in contrast, the court of appeals explained, "the Credit Practices Rule identifies specific practices * * * as *per se* unfair and prohibits those practices" (Pet. App. 51a (footnote omitted)). And the court held that the Commission did not preempt state law in an improper manner, noting that "[t]he Commission in this proceeding considered and modified the Rule to be as consistent with state laws as possible, explicitly expressed its intent not to occupy the field, and included a provision which allows states providing equal or greater protections to obtain an exemption" (*id.* at 64a (footnote omitted)).[15]

ARGUMENT

Petitioner American Financial Services Association (AFSA) raises an evidentiary issue in the guise of a legal argument. Because it does not challenge the Commission's three-part test for defining unfair acts or practices, AFSA essentially asks this Court to review the question whether substantial evidence supported the Commission's determination that certain creditor practices meet its test. This factual question does not warrant review. Similarly, the preemption challenge raised by both petitioners is without merit: the decision below that the Commission may prohibit private conduct that is permitted by certain states comports with the holdings both of this Court and of the courts of appeals.

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[15]Judge Tamm dissented (Pet. App. 66a-81a). He agreed that the Commission's three-part test sets out the appropriate standard for identifying unfair practices (*id.* at 67a-69a). But he concluded that the Commission had applied its test improperly, reasoning that the Rule enunciates "a paternalistic approach to consumer protection [that] is fundamentally incompatible with the limits imposed upon the Commission's authority" by the test (*id.* at 73a).

1. This Court repeatedly has recognized that Congress deliberately cast the prohibitions of Section 5 of the FTC Act in flexible terms to permit the Commission to address the " 'many and variable unfair practices which prevail in commerce.' " *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 367 (1965). See also *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 240-242 (1972); *FTC* v. *R.F. Keppel & Bro.*, 291 U.S. 304, 310-311 (1934). It is thus not surprising, considering the deference that is due an agency's construction of its statute (see, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984)), that the Court has cited with apparent approval an earlier administrative definition of "unfair acts or practices" (*Sperry & Hutchinson Co.*, 405 U.S. at 244-245 n.5), of which the current three-part test is a refinement.[16] See also *Harry & Bryant Co.* v. *FTC*, 726 F.2d 993, 999-1000 (4th Cir. 1984), cert. denied, No. 83-1762 (Oct. 1, 1984). Similarly, the House and Senate have separately endorsed the Commission's standard. See note 3, *supra*.

Against this background, AFSA recognizes that it cannot "responsibly quarrel" with the unfairness standard articulated by the Commission in 1980 (85-796 Pet.19).[17]

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[16]The Commission's 1964 test for unfairness specified that a practice must meet at least one (but not necessarily all) of the three criteria. Consumer injury was one of the criteria, but the test as then formulated did not explicitly require a showing that the injury was unavoidable, or explicitly require a weighing of the countervailing benefits to competition. It was to allay concern about the potential breadth of the 1964 standard that the Commission formulated its 1980 test (Pet. App. 284a, 300a).

[17]AFSA does suggest that the 1980 standard is flawed because it lacks a "public policy" component (85-796 Pet. 19). In fact, however, the Commission's 1980 policy statement recognizes the importance of public policy in assessing the consumer injury caused by a challenged practice (Pet. App. 291a-294a). Indeed, as the court of appeals explained, the Commission found substantial public policy support for the Rule (*id.* at 47a-49a). AFSA's apparent suggestion that public

Instead, it contends that the Commission applied its test improperly because it allegedly found no evidence of "seller misconduct or other interference with free and informed consumer choice" (85-796 Pet. 17). Similarly, AFSA finds fault with the Rule as a "paternalistic assertion of power" (85-796 Pet. 18) that prohibits the use of remedies "that have enabled thousands upon thousands of people * * * to borrow the money they needed or wanted" (85-796 Pet. 15). These contentions, however, cannot be squared with the record.

In fact, the Commission *did* find that the market for creditors' remedies is one in which the exercise of free and informed consumer choice is virtually impossible, with unfairness resulting from "creditors taking advantage of * * * an existing obstacle to the free exercise of consumer decisionmaking" (Pet. App. 45a). See *id.* at 108a-121a; page 5, *supra*. And AFSA's complaint that the Rule will prevent consumers from obtaining credit rests on a market model that is unsupported by the evidence presented to the Commission. HHG security interests typically arise not from free arms-length bargaining over the terms on which a loan

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policy may not be found to support the prohibition of a particular practice when one or more states have declined to prohibit the practice (85-796 Pet. 19-20) plainly lacks merit; such an approach would permit the Commission to act only when its intervention is unnecessary.

Similarly, AFSA appears to suggest that the Commission may act only in the face of overreaching or coercive "seller misconduct" (85-796 Pet. 17). Section 5, however, like the Sherman Act, is a "consumer welfare prescription" (*Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979)), and it is hardly unreasonable for the Commission in interpreting that provision to focus on whether given practices have injured consumers in ways that the market cannot correct, rather than on whether sellers have behaved in a subjectively blameworthy fashion. In any event, the Commission's approach comports with its longstanding practice. See Pet. App. 39a-46a. And as the court of appeals recognized, terms such as "coercion" and "duress" are themselves imprecise and might be applied to the conduct at issue here (Pet. App. 39a-40a n.27).

will be extended, but from the operation of a boilerplate paragraph in a form contract used in every transaction, regardless of a particular buyer's creditworthiness (Pet. App. 109a, 113a-114a). Indeed, the Commission found that the particular boilerplate remedies proscribed by the Rule (unlike others that the Rule leaves untouched) were not required by creditors to extend credit to significant numbers of consumers (*id.* at 187a-192a). The court of appeals' endorsement of this factual finding does not warrant review.

AFSA's related contention that the Commission's application of its fairness test in this case manifests an impermissible delegation of authority lacks merit. This Court repeatedly has noted, and approved, Congress's decision to grant flexible authority to the Commission. See page 10, *supra*. Moreover, petitioner's fear of unchecked agency power is belied by the results of the Credit Practices rulemaking itself: application of the 1980 standard to a massive record led the Commission to reject many of the farthest reaching provisions of the Rule as originally proposed.

2. AFSA's second contention—that the Commission exceeded its remedial powers under Section 18 of the FTC Act—also is based on a misunderstanding of the record. AFSA suggests that the Commission should have prohibited only the "abuse" of questionable creditor remedies, rather than the inclusion of all such remedies in creditor-consumer contracts (85-796 Pet. 21-23). As the court of appeals recognized, however, the Commission found the taking of HHG security interests and the use of wage assignments as collateral to be "*per se* unfair" (Pet. App. 51a). The Commission's remedy therefore was precisely tailored to the unfair practice that had been identified. See *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612-613 (1946).

ASFA's argument (85-796 Pet. 21 & n.21) that the Commission's choice of remedy cannot be reconciled with *Katharine Gibbs School, Inc.* v. *FTC*, 612 F.2d 658 (2d Cir. 1979), also lacks merit. In *Katharine Gibbs*, the court of appeals invalidated a Commission remedy because the agency had failed to identify the specific unfair or deceptive practice that it sought to curtail.[18] Here, in contrast, the Commission "defined with specificity the acts or practices deemed unfair" (Pet. App. 51a-52a)—that is, the use of particular credit practices. The relationship of the remedy (prohibition of the use of the practices) to the abuse thus is "apparent on the face" of the Rule (*id.* at 107a; see *id.* at 51a). The court below thus correctly found *Katharine Gibbs* wholly inapplicable to the Credit Practices rulemaking (Pet. App. 50a).[19]

3. The argument by both petitioners (85-796 Pet. 23-25; 85-797 Pet. 3-6) that the Rule is somehow suspect because it preempts conflicting state law plainly is insupportable. Petitioners complain only that the Rule prohibits private conduct that the laws of certain states allow (or do not

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[18]The rule at issue in *Katharine Gibbs* was directed at deceptive advertising and enrollment practices at vocational schools. Instead of defining the specific practices deemed deceptive as unfair, however, the Commission chose to regulate tuition refund policies; it hoped in that way to discourage schools from accepting students who were unlikely to complete the course of study. 612 F.2d at 662-664. The court of appeals found that there was no "rational connection between the Commission's universally applicable refund requirements and the prevention of specifically described unfair and deceptive enrollment practices" (*id.* at 664).

[19]Indeed, while the Commission disagrees with the reasoning of *Katharine Gibbs* (cf. Pet. App. 50a n.30), it carefully drafted the present Rule to conform to the requirements of that decision (*id.* at 106a-107a).

prohibit).[20] But it is beyond dispute that "federal regulations have no less preemptive effect than federal statutes" (*Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta,* 458 U.S. 141, 153 (1982)), and that "state statutes and regulations may be superseded by validly enacted regulations of federal agencies such as the FTC" (*Katharine Gibbs,* 612 F.2d at 667). Section 18 of the FTC Act, moreover, does not "limit the Commission's rulemaking authority to areas previously regulated only by the federal government." *Harry & Bryant Co.,* 726 F.2d at 999.

Petitioners correctly note that Congress did not intend the FTC to "occupy the field" of consumer protection or to supplant vital state and local consumer protection activities (85-796 Pet. 24 n.22; 85-797 Pet. 4). Here, however, the Commission did not occupy the field; instead, it identified specific unfair practices and acted to prohibit those practices. Compare *Katharine Gibbs,* 612 F.2d at 667. Indeed, as the court of appeals recognized, the Commission specifically took state laws into account, "explicitly expressed its intent not to occupy the field, and included a provision which allows states providing equal or greater protections to obtain an exemption [from the effects of the Rule]" (Pet. App. 64a-65a). In these circumstances, there was nothing exceptionable in the Commission's action.

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[20] If Commission rules are invalid whenever they infringe petitioners' standard, of course, the Commission would be able to prohibit only those unfair practices that already are forbidden by all 50 States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1986